

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

74-1550

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P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1550

UNITED STATES OF AMERICA,

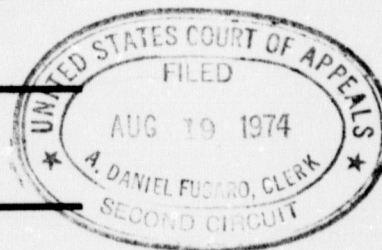
Appellee,

—against—

JOSEPH DiNAPOLI, et al.,

Appellant.

BRIEF FOR APPELLANT JOSEPH DiNAPOLI



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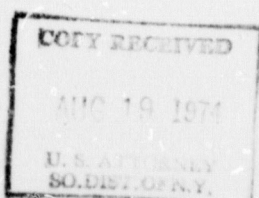


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UNITED STATES COURT OF APPEALS

FOR THE
SECOND CIRCUIT

Docket no. 74-1550

UNITED STATES OF AMERICA

Appellee

vs.

JOSEPH DINAPOLI,

Appellant

BRIEF FOR APPELLANT DINAPOLI

Appeal from a Judgment of the United States District Court for
the Southern District of New York

QUESTIONS PRESENTED

1. Whether the one million dollars seized by federal and state officers on February 3, 1972, was seized in violation of the Fourth Amendment and should have been suppressed as evidence
2. Whether introduction of testimony about and a photograph of one million dollars seized from Joseph DiNapoli on February 3, 1972 was prejudicial error
3. Whether the evidence was sufficient to convict
4. Whether the prosecutor's remarks in summation were improper and prejudicial
5. Appellant adopts the points and arguments of co-appellants to the extent applicable to him

PRELIMINARY STATEMENT

Defendant-appellant Joseph DiNapoli was charged, tried and convicted by a jury on two counts of a thirty-count indictment. Count one charged him with conspiring with thirty-two other named defendants (seventeen of whom were tried with him) to distribute heroin from January 1, 1969 until the fall of 1973, in violation of 21 U.S.C. §§ 812, 841. Count twenty-one charged him with distributing two kilos of heroin in violation of 21 U.S.C. §§ 812, 841, "In or about the month of December, 1971."

Judge Kevin Duffy, who presided at the trial, imposed the maximum permissible sentence on count one, fifteen years in prison, added a consecutive term of five years for count twenty-one, making the total imprisonment twenty years, together with an additional special parole term of three years.

The Government portrayed DiNapoli as a high echelon figure linked in the narcotics trade to unindicted co-conspirator Vincent Papa. DiNapoli was alleged to be the wholesale distributor for co-defendant Frank Pugliese, who in turn maintained an organization which supplied heroin to persons in the Bronx, New Jersey, and Washington, D.C.

In support of its theory, the Government offered evidence that when Pugliese was sent to jail on a state narcotics charge, he did not dismantle his narcotics enterprise, but turned it over to fugitive co-defendant Pat Dilacio and prosecution witness Harry Pannirello.

The Government's case against DiNapoli rested almost exclusively on the testimony of Pannirello, who, for the most part, merely repeated hearsay about DiNapoli. Pannirello admitted that he personally had never had drug dealings with DiNapoli, never saw him engaged in a drug transaction, and

never spoke to him about narcotics (18:2548).*

The Government also offered and the jury heard testimony of police officers that on February 3, 1972, months after DiNapoli was alleged to have engaged in a narcotics transaction, DiNapoli and Vincent Papa were arrested just after they left DiNapoli's house in the Bronx. A suitcase carried by DiNapoli contained almost a million dollars.¹

STATEMENT OF FACTS

A. Pre-trial motion to suppress the million dollar seizure

In the evening of February 3, 1972, Peter Pallatrone, group supervisor of the New York Joint Task Force, instructed Task Force detective John Spurdis and his partner, New York City Patrolman George Reilly, to attempt to locate the subject of an outstanding arrest warrant, known only as "John Doe." The warrant was the result of a narcotics transaction which had been witnessed by Detective Spurdis five months earlier in a Bronx tavern called the Cottage Inn (S.17, 90-91).** Spurdis had overheard an incriminating conversation between a Francis Facchiano and an unidentified individual, as a result of which a James Kersey had been arrested in September and Facchiano in January, 1972 (S.90-91). Since Spurdis could identify the John Doe, he was assigned, with Reilly, to look for him.²

1 The actual amount claimed by the Government was \$967,450. It will be rounded off hereafter as a million dollars.

2 Spurdis believed the other officers could also identify John Doe, since they were outside the bar when Spurdis made the September, 1971, observation (S.220-21).

* Reference is to Defendants-Appellants' Joint Appendix. The number preceding the colon is the volume of the trial transcript referred to.

** Reference is to Defendant-Appellants' Joint Appendix, transcript of hearing on motion to suppress. Citations to the suppression hearing will contain the pagination preceded by the letter "S."

The search for John Doe took the officers first to Spencer Drive, then to the Cottage Inn, with negative results (S.20). The officers then drove to 1908 Bronxdale Avenue, a two story private dwelling (S.21). This address was selected because Reilly had arrested Joseph DiBennedeto, the owner or manager of the Cottage Inn, for automobile theft in October, 1971, and DiBennedeto had given 1908 Bronxdale as his address (S.38-39, 218). Also, Spurdis had seen an unidentified male conversing with Facchiano some six months before in front of the Cottage Inn bar. The unidentified person was then seen entering a Buick registered to Genevieve Patalano, of 1908 Bronxdale (S.22, 217).

It was raining very, very hard that evening (S.47, 60). Visibility was poor (S.39, 388). Nonetheless Spurdis and Reilly parked their car on the street near 1908 Bronxdale and waited (S.22). About eight forty-five p.m., Spurdis and Reilly saw a 1968 Pontiac pull up in front of 1908 Bronxdale, and a white male exited from the passenger side of the car, carrying a suitcase (S.22). As the passenger entered the house, the driver of the Pontiac made a U-turn for a parking place on the other side of the street. Spurdis and Reilly also made a U-turn to get behind the Pontiac (S.23). As they drew abreast of the vehicle, Reilly and Spurdis identified Vincent Papa as the driver. Papa looked at them, then went into the house (S.24).

Reilly testified that he immediately radioed the group supervisor, Pallatrone, and told him "We have a VIP here with a suitcase. You had better get over here" (S.25). Spurdis testified that he had radioed the message to Pallatrone (S.225). In any event, the message was meant to convey that Vincent Papa was under surveillance, the initials being a code for Papa (S.25).

Pallatrone arrived around 9:00 p.m. Spurdis told him what had been observed (S.25). Three women then left the house and returned about ten

minutes later (S.26). Pallatroni claimed that he radioed in the license number on the Papa vehicle and ascertained that it was registered to "Wide World Leasing Company" of Far Rockaway, Queens (S.102). The officers then saw a white male emerge and drive off (S.26). Pallatroni and his partner Reed, followed this car, observed the driver make a turn that took him "in a complete circle" (S.106), then they returned to Bronxdale Avenue. There, they saw two more men leave the house and drive off in separate cars (S.26, 106).

Finally, about 9:30, Spurdis and Reilly saw Papa and the unknown male who had carried the suitcase into the house come out. The unknown male was still carrying a suitcase, which the officers thought but weren't positive was the same suitcase (S.28). He was carrying the suitcase with two hands and it appeared heavy (S.36).

Papa and the other man entered Papa's Pontiac and put the suitcase in the back of the car. Papa drove off with the other man in the passenger seat (S.28).

After the car had driven away, with both Pallatroni's and Spurdis' car following it, a decision was made to arrest Papa and his passenger and have a look in the suitcase. The testimony is in sharp conflict about who made the decision. Pallatroni swore that he personally ordered Spurdis to arrest the occupants of the Papa car (S.108). Spurdis swore that he had made the decision, when Pallatroni indicated reluctance to "hit the car" (S.234-36).

With Spurdis driving, according to Reilly, the unmarked police car pulled abreast of the Pontiac, Reilly flashed his badge at Papa (S.29), after which Papa pulled over, stopped, got out of the car and walked back to the police vehicle (S.29-30). Spurdis' testimony had his and Reilly's roles reversed (S.239).

Papa was immediately handcuffed (S.62). Pallatrone and Reed then went to the passenger's side of the car and handcuffed the passenger, who was later identified as DiNapoli. In the meantime, Spurdis seized the suitcase and opened it (S.62). Pallatrone asked Spurdis, "What do we have, John?" Spurdis replied, "Money." Pallatrone said, "Any junk?" (S.109). There was none.

Later that night, on Spurdis' affidavit, a search warrant was obtained and executed on the premises of 1908 Bronxdale. No narcotics or other incriminating evidence was found therein (S.67, 246). Nor was any such contraband or evidence found on the persons of Papa or DiNapoli.

Neither Papa nor DiNapoli was connected with the transaction which Spurdis had observed in the Cottage Inn five months before. And neither of them was the John Doe for whom the officers had been seeking to execute an arrest warrant. The mission which had brought the officers to 1908 Bronxdale did not figure in the decision to arrest Papa and DiNapoli (S.154).

Although the February 3, 1972 arrest of Papa and DiNapoli resulted in the filing of a magistrate's complaint against them, the complaint was dismissed within a few weeks of the arrest (S.65).

Judge Duffy found that the officers "had probable cause to stop and arrest Vincent Papa and Joseph DiNapoli...and had probable cause to search the automobile for contraband." (S-OD.12)***

B. Evidence at trial

Pannirello goes to work for Pugliese

Harry Pannirello testified that he met defendant Pugliese sometime in March, 1970 (14:2118). He told Pugliese he needed money, and Pugliese suggested that he stash some narcotics for Pugliese. Pannirello agreed and

*** Reference is to Defendant-Appellants' Appendix, Vol. S-OD, Judge Duffy's opinion denying the motion to suppress.

Pugliese turned over "seven eighths" of heroin, each one-eighth separately packaged (14:2120). Pannirello returned one package in late March or early April (14:2122), for which Pannirello was paid \$200 (14:2123). In April, he gave Pugliese another two packages (14:2123) and was present when Pugliese delivered heroin to his customers at 1380 University Avenue in the Bronx (14:2127). In May, Pannirello delivered the remaining four packages to Pugliese. For his efforts, Pannirello received a thousand dollars worth of fireworks (14:2129).

Pannirello sees Pugliese give money to DiNapoli

Sometime in June, 1971, Pugliese asked Pannirello to ride over with him to DiNapoli's girlfriend's house on Bronxdale Avenue so Pugliese could "bring him some money." (14:2131). Pannirello did so, and there, he said, met DiNapoli and his girlfriend (14:2132). Pugliese laid eight to ten thousand dollars on the table. DiNapoli started to count the money, then pushed it aside (14:2132). No one told Pannirello what the money was for, and there was no testimony about any conversation between Pugliese and DiNapoli on that occasion.

Pannirello was asked to look around the courtroom to see if he saw anyone who resembled DiNapoli. He did so, and said, "No, I don't" (14:2131). Defense counsel, at the close of the day, requested a direction to the Government not to discuss the testimony or identification with the witness (14:2160). Judge Duffy said, "I've not had to make such directions before and nothing has happened. I assume nothing is going to happen now. Why do I have to make a direction?...I don't think that much caution is necessary" (14:2161). The next day, however, Pannirello identified DiNapoli. A Wade hearing was held, and Pannirello admitted having discussed his failure to identify DiNapoli with Government prosecutors the night before (15:2305).

The trial judge denied the defense motion to suppress the identification.

Pugliese bequeaths the business

In October, 1971, Pannirello met with Pugliese and Pugliese's drug partner or associate, Pat Dilacio (14:2153), for the purpose of turning the business over to them in view of Pugliese's pending imprisonment on a state narcotics charge (14:2152). According to Pannirello, Pugliese said that he was going to leave two kilos of heroin and some cash, and directed Dilacio to pick up the heroin from an unnamed stash, give it to Pannirello, and Pannirello was to deliver it to customers (14:2154). Pugliese gave Pannirello several telephone numbers (14:2156). He also told Pannirello that he was going to give Joseph DiNapoli's telephone number to Dilacio, but not to Pannirello because Pannirello would not be in contact with DiNapoli (14:2157). Pugliese also told Pannirello that "Dilacio was going to pick up from Joseph DiNapoli and I was to make the deliveries to our customers" (14:2158). Dilacio was to pay DiNapoli for the narcotics (14:2159).

Pannirello delivers to Dawson

Apparently in the same meeting, Pugliese told Pannirello to call Dawson and tell him they had some goods for him and he should come the following night (14:2156). Pugliese also told Dilacio to get two kilos from DiNapoli and stash them in Pugliese's garage (14:2166). The next night, Pannirello went to Pugliese's garage, removed half a kilo, and delivered it to Dawson (14:2156). Pannirello and Dilacio each kept \$4,000 of the \$16,000 Dawson paid, and Dilacio put the remaining \$8,000 in his closet (14:2168). Half a kilo subsequently went to Barnaba and "the rest of it was given to Basil, Al Greene" (14:2170).

Pannirello gets goods from Gamba

In late November or early December, 1971, Dilacio told Pannirello that he was going to get a kilo from DiNapoli for \$22,000 (14:2175). Shortly thereafter, Dilacio told Pannirello that he had a kilo stashed with defendant Gamba (14:2177). Pannirello went to Gamba's and got two packages of heroin. Pannirello was of the opinion that the heroin came from DiNapoli (14:2176), but the basis for his opinion was not elicited.

Dilacio can't get heroin from DiNapoli, turns to Carmine Pugliese

In December, 1971 or January, 1972, Pannirello saw Dilacio dial a phone number, say, "Hello" and "Okay, I'll be in touch with you" (14:2182). Dilacio mentioned Joe on the telephone (14:2183) and later told Pannirello that Joe said to sit tight, "there was nothing happening right now" (14:2184). Subsequently, Dilacio told Pannirello that he had made several attempts to purchase narcotics from DiNapoli but "Joe just kept putting him off...." As a result, Dilacio and Pannirello began doing business with Carmine Pugliese, who told them that DiNapoli "did have goods" but "he wasn't giving them to anyone" (14:2186).

DiNapoli is somebody's partner

Pannirello testified that Pugliese told him that DiNapoli "was partners" in drugs with a man named Vinnie (14:2217). Barnaba testified, however, that Pugliese told him that Pugliese and DiNapoli were partners (11:1457). Dilacio, on the other hand, had told Barnaba that Angelo "Butch" Mamone was DiNapoli's partner (10:1461). Evidently confused, Barnaba asked, about DiNapoli, "How many partners does he have?" He got no answer (10:1462).

The million dollars

The Government's case against DiNapoli also included testimony of Pallatroni and Reilly who told the million dollar seizure story to the

jury (28:3605). A photograph of the money was also introduced (28:3657). As a fillip, the Government elicited from Dawson, a customer of Pannirello's, that, in February, 1972, Pannirello said he had lost his connection since the fellow who supplied him with narcotics had been arrested with a million dollars, a small amount of which was his (19:2656).³

C. DiNapoli's defense

When cross-examined about his claim of having met DiNapoli in the house on Bronxdale Avenue, Pannirello could not say whether the house was detached or not (18:2554); could not identify DiNapoli's girlfriend (18:2554), nor say whether she was fat, slim or pregnant (18:2555). Pannirello was certain, however, that when he was in the apartment meeting DiNapoli, he could see the dining room from the living room (18:2557). Four witnesses testified for the defense, however, that it was impossible to see from the living room into the dining room, since they were completely divided by a solid wall. Photographs were introduced to corroborate the testimony (24:3270; 30:3999, 4007, 4122).

In an effort to minimize the prejudice of the million dollars, the defense also called a witness who testified that he worked for DiNapoli in the shylocking business (30:4123). He further testified that he and DiNapoli had plead guilty to a federal indictment charging them with shylocking and both had been sentenced on January 4, 1973. He testified that at the sentencing on the shylocking case, the Assistant United States Attorney had

3 Pannirello was not asked about this story when he testified. Pannirello admitted, however, that he had told other lies to blow up his importance. For example, he told an undercover agent he had been in drugs for ten years, that he had made half a million dollars and had "stashed away \$300,000," when in fact he was broke. All these stories were lies (18:2548).

told the judge that DiNapoli was involved in shylocking "of some magnitude and...involved the implied or actual use of physical violence" (30:4124-25). He added that it had been claimed by the Government on that occasion that DiNapoli's loan sharking involved "hundreds of thousands of dollars." Not once did the Government mention narcotics, despite the fact that the million dollars had been seized almost a year before (30:4126).

ARGUMENT

1. The arrest of DiNapoli was without probable cause and the search of his suitcase was unconstitutional

Joseph DiNapoli, unknown to the police officers parked on the street outside his house, arrived home early in the evening of February 3, 1972, and carried a suitcase into his house.⁴ He emerged forty-five minutes later, still carrying a suitcase. Because he was accompanied by a suspected narcotics violator, and virtually nothing more, he was arrested and the suitcase was searched. If the arrest and search were "reasonable," the Fourth Amendment has become a fiction.

Detective Spurdis, who signed the magistrate's complaint (S.66) and the affidavit for the subsequent search of 1908 Bronxdale Avenue as the arresting officer (S.67), and who received a citation for the arrest (S.337), testified that he alone made the decision to "hit the car" (S.235); it was an investigatory arrest and search (S.236), the arrest was "for nothing" (S.248), other than "to look into the suitcase" (S.247), and there was never a belief on his part that there was "probable cause" (S.284): He further stated (S.247):

"There was no informant. There was no specific information. There was nothing observed, that is to say, no one was seen with a pistol or a glassine envelope or anything of that nature. If that's what you're trying to bring out, no, sir, there wasn't."

"Q. Well, was a factor in your consideration the fact that Vincent Papa was known to your bureau or believed to be involved in narcotics transactions? Was that a factor?"

⁴ DiNapoli lived at 1908 Bronxdale Avenue with Genevieve Patalano (26:3254).

"A. That was the only factor."

"Q. And the second factor was the carrying of the suitcase; is that correct?"

"A. Well, that would be secondary, because Mr. Papa, far as I could determine, did not bring the suitcase in the house, but it was just Mr. Papa's presence at the house that aroused my suspicions as a police officer as to what he was doing there."

Judge Duffy concluded that "John Spurdis is a liar" (S-OD,1). Officer Reilly, however, who was called as a Government witness and whom Judge Duffy apparently believed, testified that officer Pallatroni directed the stopping and searching of the car before it even left 1908 Bronxdale Avenue (S.29). He frankly told the court:

"Q. But as you got out of the car your immediate intent was to place Papa and DiNapoli under arrest?"

"A. True, correct."

"Q. And then to make a search?"

"A. Correct."

"Q. Of that valise, is that correct?"

"A. Correct."

"Q. That was your intent?"

"A. Correct."

"Q. In other words, there was no vehicle infraction involved here of any kind, is that correct?"

"A. No."

Officer Reed, Pallatroni's driving companion that night, admitted that DiNapoli and Papa were both under arrest and in handcuffs before the search of the car (S.408). When asked the reason for DiNapoli's arrest, he replied, "I don't know" (S.409). He later volunteered, "For violation of the federal

narcotics law" (S.409). He further admitted that neither DiNapoli nor Papa had committed any crime prior to their arrest (S.412).

Officer Pallatroni, however, tried to save the search. His efforts were imaginative but flimsy and fanciful.

Pallatroni relied heavily upon Papa's reputation as a narcotics dealer. He said that Papa had a criminal record "dating back to 1938, that in the mid-50s he had been arrested...for violation of the federal narcotics laws, for which he was convicted" (S.96). Moreover, back in December, 1971, Pallatroni had arrested one Stanton Garland who expressed a desire to cooperate and told a story about two men who supplied him with heroin. He said that they were distributors for Papa (S.99). Garland also claimed to have met Papa personally on two occasions (the dates of which were undisclosed), when they discussed drugs (S.100). As a result of Garland's cooperation, Papa and twenty other defendants had been indicted in January, 1972, for narcotics violations in the Eastern District (S.100). Garland absconded, however, and was never seen again (S.134). He was also found in illegal possession of a gun while an informer (S.352). There was no claim by Pallatroni or anyone else that Garland was a reliable informer or that there was any serious basis for crediting him. Spurdis, on the other hand, swore without contradiction that Garland was not considered a reliable informant and was held in low esteem (S.352). Judge Duffy found as a fact that Garland has been "proved unreliable" (S-OD 4).

Even if Garland had been reliable, his information was too stale and too vague to furnish more than a general suspicion. Wong Sun v. United States, 371 U.S. 471 (1963); Beck v. Ohio, 379 U.S. 89 (1964); Aguilar v. Texas, 378 U.S. 108 (1964); United States v. Bursey, 5th Cir. 3/22/74, 15 Cr.L.R. 2087.

It offered no basis whatsoever for concluding that Papa, shortly after being indicted on narcotics charges in the Eastern District, would be engaging in a narcotics transaction on February 3, 1972, at 1908 Bronxdale Avenue. To consider this information as warranting a conclusion that Papa was engaged in a narcotics transaction with DiNapoli, in DiNapoli's home, with three women and three men (one of whom, as will be noted, was an attorney) present, is quite simply to hold that anyone associating with a person under indictment for narcotics is open game for the police and may be arrested and searched at will. For all that the police officers knew, DiNapoli could have been Papa's attorney, and the suitcase could have contained records relevant to Papa's defense. Had this been the case, there is no doubt that the officers would have been liable for an illegal arrest and search.⁵ Yet it is elementary that an arrest cannot be justified by what a subsequent search discloses. Johnson v. United States, 333 U.S. 10 (1948); Henry v. United States, 361 U.S. 98 (1959).

A warrantless arrest or search is presumptively illegal. Katz v. United States, 389 U.S. 347, 357 (1967). This is equally true where the arrest is of occupants of an automobile. Coolidge v. New Hampshire, 403 U.S. 443 (1971). Cf. Almeida-Sanchez v. United States, 413 U.S. 266, 269 (1973) ("Automobile or no automobile, there must be probable cause..."). "An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964). That is precisely what happened here.

⁵ Spurdis testified that prior to the arrest he told his partner Reilly, "if that suitcase contained clothes or underwear or anything like that that wasn't illegal we were going to be in a lot of trouble." (S.314).

Pallatroni attempted to justify the arrest by stating that his suspicions drew some confirmation from the fact that a male left the apartment and drove off. He concluded that this was a diversionary tactic since, "when a transaction is going to take place a lead car will go out... to take whatever surveillance officers might be there away from the area" (S.106). Had Pallatroni checked, however, he would have learned that the car was registered to Murray Richman, a New York attorney, who testified at the hearing that he was at 1908 Bronxdale visiting Jean Patalano and Vincent DiNapoli, who was to be sentenced on February 15th. He also discussed the purchase of a house with Joseph DiNapoli (S.190-193). He was manifestly not engaged in any diversionary tactics (S.194-195).⁶

The concept of probable cause obviously allows room for a police officer to make a mistake. But officer Pallatroni's inference about Murray Richman's car, if not an afterthought, contributed nothing to the existence of probable cause. Richman's leaving the premises was entirely innocuous, and Pallatroni's hunch about it was nothing more than a bootstrap affixed to his vague suspicions about Vincent Papa. The Court's observations in Terry v. Ohio, 392 U.S. 1 (1968), are apt:

"...the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge.... And in making that assessment it is imperative that the facts be judged against an objective standard.... Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches....If

⁶ The Government so conceded below (S.537).

subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects,' only in the discretion of the police." Id. at 22.

Papa's notoriety and reputation with the police officers could not properly be imputed to DiNapoli, so as to give probable cause to arrest him and search his suitcase. United States v. Gonzales, 362 F. Supp. 415 (SDNY 1973). Likewise, "the reputation of an area [or a companion], although it may create suspicions about otherwise innocent activities, cannot furnish probable cause when the activities themselves are unexceptional." Id. at 421. Cf. Sibron v. United States, 392 U.S. 40 (1968); Spinnelli v. United States, 393 U.S. 410 (1969) ("police suspicion ...may [not] be used to give additional weight to allegations that would otherwise be insufficient."); United States v. DiRe, 332 U.S. 581 (1948).

Pallatroni's suspicions were further fed by his belief that the car that Papa was driving was a rented car. Pallatroni "attached quite a bit of significance to that fact" because "individuals in narcotics and other areas of organized crime use leased cars in order to conceal their identity." (S.103). Even if the factual premise were correct - that Papa was driving a rented car - it surely would be the end of the Fourth Amendment to permit an inference of criminal activity to be drawn against a person because he rides in a rented car. There was no data or other factual basis for crediting Pallatroni's notions about rented cars. For a court to accept his assertions would be to abdicate its responsibility to determine probable cause from objective facts and reasonable inferences. Sibron v. United States, supra; Terry v. Ohio, supra. It is the duty of an appellate court, as much as that of the trial court, "where necessary to the determination of constitutional rights, [to] make an independent examination of the facts, the

findings, and the record [and] determine for itself whether... constitutional criteria...have been respected." Ker v. California, 374 U.S. 23, 34 (1963) (emph. supp.). Accord Beck v. Ohio, supra.

Moreover, Pallatroni was not only wrong about Papa's car being a rented car, he was unreasonably if not willfully wrong. An employee of Wides Motor Sales testified at the suppression hearing that Mr. and Mrs. Papa had purchased a 1972 Pontiac from him, had brought it in for repairs, and had been given the 1968 Pontiac as a loaner (S.362-63). The car was owned by Wides Motor Sales - which was not in the leasing or renting business (S.364) - and not by Wide World Leasing Corporation, as reported by Pallatroni (S.182).

Pallatroni should have doubted that a four year old automobile was a rental car. He should have known it was not a rental car when he saw that it had dealer plates (S.50, 180) and did not have the Zs or Ys required of rental cars by New York law (S.183). The rented car therefore vanishes as a component of probable cause.⁷

Pallatroni could think of nothing else of significance to justify his arrest and search of DiNapoli.⁸ The Government intimated that the officers may have suspected that DiNapoli was the John Doe they were looking for (S.525, 528) but the evidence was conclusively against this claim. Spurdis testified that he would "most certainly" recognize the John Doe if he saw him, and DiNapoli was "most definitely not" John Doe (S.215). Pallatroni moreover, was not thinking about John Doe when he ordered the arrest (S.154).

7 The Government conceded below that the Pontiac was not in fact a rented car (S.526, 537).

8 Pallatroni thought it was unusual for Papa to be in the Bronx rather than Queens (S.156), but surely this needs no comment.

Post-arrest suspicions

While in conflict over who decided to effect the arrest (S.108, 234), who actually effected it (S.29, 239), and precisely when the decision was made, the officers were unanimous in their testimony that a decision was reached to arrest Papa and DiNapoli when or shortly after they reentered the Pontiac.⁹ There was nothing furtive or unusual about the manner in which the automobile was operated which contributed to the decision to make the arrest. The arrest was effected when the officer, whichever one it was, Reilly or Spurdis, flashed his badge and his gun and ordered Papa to stop. At that point, Papa's freedom of movement was curtailed and the arrest was complete. Henry v. United States, 361 U.S. 98 (1959); Taylor v. Arizona, 471 F. 2d 848 (9th Cir. 1972); United States v. Gonzales, 362 F. Supp. 415 (SDNY 1973). If the arrest was without probable cause, the subsequent search was unlawful, Henry v. United States, *supra*; Beck v. Ohio, *supra*; Wong Sun v. United States, 371 U.S. 471 (1963). It is therefore immaterial to the validity of the arrest that the arrestees may have acted suspiciously as the arrest was being effected, for to permit post-arrest conduct to contribute to probable cause is to justify an illegal arrest by its fruits. Cf. Wong Sun v. United States, *supra*. Pallatroni's claim that Papa acted suspiciously because he got out of the car after being arrested is therefore irrelevant. Apart from being irrelevant, however, it is ludicrous. Pallatroni said that when Papa got out of his car and walked back to the police car,

9 Spurdis, who claimed he made the decision to arrest, indicated that he made the decision before Papa and DiNapoli even got into the car (S.314-317). Reilly indicated the Pallatroni's order to "take the car" occurred while the Pontiac was moving (S.80) but that he had previously been instructed "to take them out of the area and place them under arrest." (S.29). Pallatroni claimed that he gave the order when the car reached Bronxdale and Tremont Avenues (S.108). Reed said the order was given near the intersection of Castle Hill and East Tremont (S.406).

"it was a very sharp move," indicating Papa wanted to divert attention from the car (S.109-110). Pallatroni generalized that, "when a police officer stops a car most people sit in the car and wait for the police officer to go to the car, ask for a license or whatever business there is to conduct" (S.110). Even if this dubious proposition is true, it is simply absurd to infer criminality from the fact that an arrestee gets out of his car and walks back to the police vehicle. Indeed, the Supreme Court, in Adams v. Williams, 407 U.S. 143 (1972), attached significance to the fact that the driver did not get out of the car when accosted by a police officer, as a justification for searching his person. Furthermore, since DiNapoli remained in the car, Papa's actions could hardly have been calculated to keep the police away from it.

Probable cause exists where the facts and circumstances within the arresting officer's knowledge and of which they have reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. Draper v. United States, 358 U.S. 307 (1959). Nothing remotely approaching that existed in this case. Cf. Gonzales v. United States, supra; Henry v. United States, supra; Beck v. Ohio, supra.

The search, in any event, was unlawful

Assuming arguendo that the officers had probable cause to arrest DiNapoli without a warrant, their warrantless search of the contents of his suitcase was a violation of the Fourth Amendment. Inasmuch as both Papa and DiNapoli were almost immediately handcuffed, there was no possibility whatsoever that either of them would destroy the contents of the suitcase or obtain a weapon from it. The search of the contents of the suitcase was

therefore not incidental to the arrest. Chimel v. California, 395 U.S. 752 (1969); Coolidge v. New Hampshire, 403 U.S. 443 (1971). The officers could have taken the suitcase into custody and attempted to get a search warrant for its contents. That is what they should have done. In United States v. Soriano, 482 F. 2d 469 (5th Cir. 1973), federal narcotics agents, with ample probable cause, arrested defendants in a taxi at an airport, removed a suitcase from the taxi, opened it, and found narcotics. The Fifth Circuit correctly held that even though the defendants were arrested in an automobile, there was probable cause to believe they had narcotics in the suitcase, and the officers were entitled to seize the suitcase, they had no justification for opening it without a warrant. There, as here, no exigent circumstances whatsoever existed to justify circumvention of the warrant requirement.

Furthermore, even if the court disagrees with Soriano, the search of the suitcase cannot possibly be justified if there was no probable cause to believe it contained narcotics. Even if the officer's vague suspicions that something illegal was underway may somehow be said to constitute probable cause to arrest Papa and DiNapoli, the most paranoid of policemen, let alone reasonable men, could not have formed a belief, as opposed to a hope, that the suitcase carried by an unknown man from his own house contained narcotics. No officer testified that he had such a belief. None could have done so.

The testimony about the million dollars and the photograph of same should therefore have been suppressed.

2. It was prejudicial error to admit evidence that DiNapoli was arrested with Vincent Papa on February 3, 1972, in possession of nearly a million dollars in cash

After extended objection and argument by many counsel (26:3416-3422, 27:3554-3560, 3563-3564), Judge Duffy ruled admissible testimony about the million dollar seizure (28:3603). Seventy-two pages of testimony were then elicited from officers Reilly and Pallatroni concerning the events on February 3, 1972, and the discovery of the million dollars in DiNapoli's suitcase (28:3605-3676). The court also admitted into evidence over objection the suitcase (28:3625) and a photograph of the money (28:3657-58).

The principal theory upon which the Government apparently predicated admissibility of the sensational evidence was that the possession by DiNapoli of almost a million dollars on February 3, 1972, corroborated Pannirello's testimony that Pugliese gave DiNapoli eight or ten thousand dollars in June, 1971, eight months before, and the Government's claim that Dilacio bought a kilo of heroin from DiNapoli for \$22,000 in late November or early December, 1971 (14:2175).¹⁰ Had DiNapoli somehow claimed to be a pauper, or had the Government shown that he lacked significant wealth prior to these events, his proximity to a million dollars several months later might have some terious relevancy. Evidence of a sudden acquisition of wealth at or about the time of an alleged acquisitive crime is concededly probative of that crime. See United States v. Trudo, 449 F. 2d 649 (2d Cir. 1971); United States v. Ravich, 421 F. 2d 1196 (2d Cir. 1970); 1 Wharton's Criminal Evidence § 212, p. 443; § 213, p. 446-48 (13 ed. 1972); 1 Wignmore § 154, p. 601 (3d ed. 1940). Similarly, if the actual bills allegedly received in

¹⁰ See Government's Trial Memorandum 1-4.

the crime, or even the same denominations, were subsequently found in a defendant's possession, there is a nexus which warrants admissibility. It is otherwise, however, if the defendant is merely found in possession of a quantity of money corresponding in amount to the fruits of the crime, for "the hypothesis that the money found is the money taken is too forced and extraordinary to be receivable." 1 Wigmore, supra, at 601.

Here, there was neither claim nor evidence by the defense that DiNapoli lacked the means to participate in the crimes charged. Neither was there claim or evidence offered by the Government of any change in DiNapoli's financial position during the period in question. The probative value of the million dollars was therefore so strained and vaporous as to be virtually nonexistent. See United States v. Williams, 168 U.S. 382 (1897); Neal v. United States, 102 F. 2d 643 (8th Cir. 1939).

This is plainly not a case like United States v. Tirinkian, 488 F. 2d 873 (2d Cir. 1973), where the sum of \$146,000 was found in the possession of an accessory on the very day customs officials discovered a shipment of 286 pounds of hashish and the accessory was about to embark to Bierut. There, the money was brigaded in time and circumstance to both the illegal shipments and the flight. The prejudice was also minimized by the fact that the money was not found in the defendant's possession. Furthermore, the sum was about one-seventh that involved in this case.

Neither is it a case like United States v. Dono, 428 F. 2d 204 (2d Cir. 1970), where the sum of money about which testimony was introduced (\$1978) was so small as to make the risk of prejudice negligible.

In the present case, the introduction of testimony about the million dollars was the virtual equivalent of character evidence. What the Supreme

Court said about the sum of \$5000 is applicable, with proportionate magnification, to a million:

"The manifest object and the necessary effect of this evidence was merely to give color to the present charges, and to cause the jury to believe that the accused had in his possession more money than a man in his condition could have obtained by honest methods." Williams v. United States, 168 U.S. 382, 396 (1897).

This evidence inevitably stamped DiNapoli as a major criminal. Its relevance was less and its prejudicial effect far greater than the suitcase admitted in United States v. Falley, 489 F. 2d 33 (2d Cir. 1973). There, to corroborate its witness, who testified to a hashish smuggling conspiracy with the defendants, the Government offered into evidence a suitcase containing five kilos of hashish, some heroin, and narcotics paraphernalia which had been seized from the witness during the period of the alleged conspiracy, but which he said was not part of the conspiracy. There, as here, the principal purpose of the evidence was to corroborate the witness. This court, through Judge Moore, reversed:

"Although the suitcase and its contents...were relevant to brand [the witness] as a smuggler and supported the court's credibility theory to this extent, this relevance was outweighed by the prejudice which might have been engendered in the minds of the jury..." Id. at 37.

In Falley, though not here, cautionary instructions were given concerning the limited relevance of the suitcase and its contents. Still, the court said:

"Under the circumstances, the court could not, with a mere verbal instruction, undo the sensation created by the introduction of this large quantity of illegal drugs into the courtroom. The prejudice, unfairly enlisted, would have undoubtedly continued to color the proceedings to defendants' prejudice." Id. at 38.

It can scarcely be suggested that five kilos of hashish and a small quantity of heroin found in possession of the Government witness created a greater "sensation" or a likelihood of more prejudice than a million dollars found in possession of the defendant. Nor could its "color [on] the proceedings to defendant's prejudice" have conceivably exceeded that of the million dollars.

The Government's offer of this evidence was evidently an afterthought, as it is not included as an overt act in the indictment.¹¹ Here, as in Falley, "The fact that the [evidence] could be peripherally related to the proceedings is more of an ex post facto rationalization of the prosecution's behavior than an accurate description of its motivation." Id. at 37.

Proof of DiNapoli's possession of a million dollars on February 3, 1972, was not only damning character evidence, it was nothing more nor less than proof of an unrelated crime. The possibility that the million dollars was innocently acquired was remote at best. Its possession was therefore cogent evidence of some unknown crime at some time. Yet this evidence came within none of the well-recognized exceptions to the prohibition against other crimes evidence, i.e. as proof of intent, knowledge, motive, identity, or common scheme or plan. See United States v. Byrd, 352 F. 2d 570 (2d Cir. 1965); Spencer v. Texas, 385 U.S. 554, 560-2 (1967); Parker v. United States, 400 F. 2d 248, 251-2 (9th Cir. 1968). Occurring as it did approximately two

¹¹ Apparently, there are grand plans for the million dollar evidence. In another indictment filed subsequent to the verdict in the present case by the United States Attorney for the Southern District against Papa and others (74 Cr. 251), the million dollar seizure is specified as an overt act. New York's Special Prosecutor Maurice Nadjari has filed yet another indictment against Papa and former New York City Detective Frank King, for harboring fugitives (New York County Supreme Court, Indictment No. 2546/74), in which the million dollars is employed on still another theory.

months after DiNapoli, according to the Government's hearsay evidence, refused to participate in heroin transactions (14:2128), and itself having no connection with a heroin transaction, the million dollar seizure was patently inadmissible as other crimes evidence. The possession by DiNapoli of any sum of money in February, 1972, would be inadmissible; possession of a million dollars was unquestionably a matter about which the jury should not have heard.

The million dollar story also quite unfairly undermined the defendant's right not to testify. Confronted with the highly inflammatory evidence, having no relation to the present charge, he was forced to offer damaging evidence that he was in the shylocking business. He did this in cross-examining Pallatrone (28:3672-73), and then by calling his own witness, who not only testified that DiNapoli was a shylock (30:4123) whose business was "very, very big" (30:4125), but revealed that DiNapoli had even plead guilty to a federal charge of shylocking and was sentenced on January 4, 1973, to three years in prison (30:4124).¹² As counsel explained prior to offering this evidence, "I am obliged to put this witness on very reluctantly, but the... million dollars gives me no other choice." (30:4117-18). That this would be a necessary consequence of admitting the million dollars was made known to the court in trial memoranda¹³ and in colloquies prior to receipt of the evidence (26:3421, 27:3558-60).

The purpose and effect of this evidence was not unlike that present in a homicide case reviewed, and reversed, by Judge Cardozo, in People v. Zackowitz, 254 N.Y. 192, 172 N.E. 466 (1930):

12 DiNapoli was even compelled to elicit evidence that his shylocking activities "involved the implied and actual use of physical violence." (30:4124-25).

13 See DiNapoli's Trial Memorandum and Supplemental Trial Memorandum.

"The endeavour was to generate an atmosphere of professional criminality.....There is nothing stronger than mere suspicion to guide us to an answer. Whether the explanation be false or true, he should not have been driven by the People to the necessity of offering it. Brought to answer a specific charge, and to defend himself against it, he was placed in a position where he had to defend himself against another, more general and sweeping. He was made to answer to the charge, pervasive and poisonous even if insidious and covert, that he was a man...of criminal disposition." 254 N.Y. at 198; 172 N.E. at 468.

DiNapoli, moreover, was unable to answer the charge that he was a man of criminal disposition. He was forced by the inflammatory evidence of the million dollars to admit that he was precisely that. Such was patently the hope and purpose of the prosecution.

In Shepard v. United States, 290 U.S. 96, 104 (1933), Justice Cardozo said:

"It is for ordinary minds, and not for psychoanalysts, that our rules of evidence are framed. They have their source very often in considerations of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

In United States v. Krulewitch, 145 F. 2d 76 (2d Cir. 1944), Judge Hand said:

"...The competence of evidence in the end depends upon whether it is likely, all things considered, to advance a search for the truth; and that does not inevitably follow from the fact that it is rationally relevant. As has been said over and over again, the question is always whether what it will contribute rationally to a solution is more than matched by its possibilities of confusion and surprise, by the length of time and the expense it will involve, and by the chance that it will divert the jury from the facts which should control their verdict. Wigmore §§ 39(2), 42...." Id. at 80.

Under either of these tests, the million dollar story should never have been told. Cf. Blumberg v. United States, 222 F. 2d 496, 500 (5th Cir. 1955); United States v. Tomaiolo, 249 F. 2d 683, 690 (2d Cir. 1957). This evidence had three of the counterweights, each of which is ordinarily sufficient to require exclusion of marginally relevant evidence: danger of prejudice,^{14a} probability that proof and response will confuse and distract, and likelihood of undue time consumption. See McCormick, Evidence 439 (2d ed. 1972). Where, as here, there were thirty-three indicted defendants, thirty-five unindicted co-conspirators, eighteen defendants on trial, thirty counts in the indictment, and more than sixty witnesses, it was difficult enough, if not impossible, for the jury to comprehend, sift and sort the probative evidence, and imperative that it not be prejudiced, confused, and poisoned by the million dollar episode and its sequela. Since the existence of the counterweights was made plain to the trial judge, it was a clear abuse of discretion for him to have admitted the evidence.^{14b}

14a It is not without significance that included in the testimony about the million dollars was the fact that four narcotics detectives arrested DiNapoli (28:3616). This invited speculation that the officers had information that he was guilty of narcotics violations.

14b While we contend with all available vigor that the entire episode at 1908 Bronxdale Avenue was inadmissible, there was an obvious alternative available to the Government and the court. They could have accepted the suggestion implicit in the arguments of Mr. Fisher (26:3419) and Mrs. Rosner (27:3554) that the Government could accomplish its avowed and only plausibly legitimate objective by a restricted offer, e.g. that DiNapoli was in possession of a "substantial sum of cash" or "in excess of ten thousand dollars." It would surely have been within the court's discretion to order the Government to instruct its witnesses to so testify.

3. The evidence against DiNapoli was insufficient to convict on either the conspiracy count or the substantive count

Before statements of alleged co-conspirators can be considered against a defendant, the prosecution must prove by the defendant's own act, deeds, or other competent evidence, his participation in the conspiracy. Glasser v. United States, 315 U.S. 60, 74 (1942); United States v. Geaney, 417 F. 2d 1116 (2d Cir. 1969). Such evidence must prove his membership in the conspiracy "by a fair preponderance of the evidence independent of the hearsay utterances," United States v. Geaney, *supra*, or to a level high "enough to take the question to the jury." United States v. Nixon, 42 LW 5237, 5243, n. 14. (July 24, 1974). Where, as here, there was timely objection and motion to strike the hearsay,¹⁵ and it is determined on appeal that the defendant's participation was not independently proved, a conviction should be reversed with directions to acquit. United States v. Fantuzzi, 463 F. 2d 683, 691 (2d Cir. 1972). In "assessing the evidence of the existence of a conspiracy and each defendant's connection with it, hearsay statements of other alleged co-conspirators, (including co-defendants) must be excluded from consideration." United States v. De Cavalcante, 440 F. 2d 1273 (3d Cir. 1971).

When the hearsay concerning DiNapoli is stripped away, nothing remains. DiNapoli was never present when a narcotics transaction took place, never present when anybody said anything about narcotics, "goods," "shirts," or any other euphemisms; and he never said or did anything about narcotics. DiNapoli

¹⁵ Before trial, defendants were granted a standing objection to hearsay admitted subject to connection on the conspiracy (40:5446; 40:5459-60), and an omnibus motion to strike such hearsay was made and denied (33:4494). Also, at the close of the Government's case, the court said "I assume that you make all the motions..." (28:3680).

was seen by Government witnesses on only two arguably significant occasions: In June, 1971, when Pannirello claimed to have accompanied Pugliese to 1908 Bronxdale where Pugliese handed DiNapoli eight or ten thousand dollars (14:2132), and on February 3, 1972, when four police officers arrested him in possession of the million dollars (28:3605-3676). By no stretch of fancy can this be thought to constitute proof by "a fair preponderance" or "enough to take the question to the jury" of DiNapoli's participation in the conspiracy charged. It is at least as consistent with the uncontradicted evidence that DiNapoli was a shylock (28:3672; 30:4123), for which offense he has already been convicted (30:4124), as it is with his participation in any criminal conspiracy, and it plainly does not place him in the heroin conspiracy charged below. There wasn't even any hearsay introduced concerning the purpose of Pugliese in giving DiNapoli the money in June, 1971, and Pannirello's admissions that he never discussed drugs with DiNapoli nor heard DiNapoli discuss drugs (18:2548-49) reduces the cogency of that evidence to the vanishing point. The trial court should have stricken the hearsay and granted a judgment of acquittal. Cf. United States v. Freeman, 2d Cir. June 7, 1974 (Slip op. #1050).

The substantive count

The evidence in support of count 21, which was not submitted to the jury under the Pinkerton doctrine (Pinkerton v. United States, 328 U.S. 640 (1946)), was insufficient to permit an inference of guilt beyond a reasonable doubt, United States v. Taylor, 464 F. 2d 240 (2d Cir. 1972), even if all the hearsay concerning it is given all the weight it can carry.¹⁶ According

¹⁶ It was, of course, inadmissible and should have been stricken if our argument above is correct.

to Pannirello, Pugliese in October, 1971, said that "Dilacio was going to pick up from Joseph DiNapoli and [Pannirello] was to make the deliveries." (14:2158). After Pugliese went to jail, in late November or early December, 1971 (14:2174), Dilacio told Pannirello that he had called DiNapoli and that DiNapoli "was going to give him a kilo" for \$22,000 (14:2175). Dilacio also told Pannirello that he was going to pick up the kilo and take it to Gamba, the stash (14:2175). Sometime thereafter, still in late November or early December, Pannirello went to Gamba's, picked up two packages which Gamba said was a kilo (14:2177), and sold it (14:2178). Whether the kilo which Pannirello picked up from Gamba had actually been acquired from DiNapoli is left to conjecture. There isn't even evidence that Dilacio said he had gotten the kilo from DiNapoli. The conjecture is considerably undercut, moreover, by Pannirello's admissions on cross-examination that this transaction could have occurred as late as January 15, 1972 (18:2568), whereas Pannirello had truthfully told agent Nolan that after Pugliese went to jail, Dilacio was never able to get drugs from DiNapoli (18:2569-79). The speculation becomes even more shaky when it is noted that, prior to Pannirello's picking up the kilo from Gamba, Gamba had been used as a stash by Pugliese (14:2175-76). Furthermore, there isn't even hearsay evidence that anybody ever paid DiNapoli anything. Thus, even if there had been sufficient evidence to convict DiNapoli on the conspiracy count, there was not enough independent and hearsay evidence to convict him on count 21.

4. The prosecutor's arguments in summation were improper and prejudicial

Although this court has frequently condemned prosecution efforts to place the prestige of the Government or the Bureau of Narcotics on the line in summation, United States v. LaSorsa, 480 F. 2d 522 (2d Cir. 1973); United States v. Benter, 457 F. 2d 1174 (2d Cir. 1972); United States v. Puco, 436 F. 2d 761 (2d Cir. 1971), Mr. Curran told the jury:

"...we would like you to try us, the government. In fact, we urge you to try us. Try us with a careful review of all the facts that are before you; before you in evidence on the record, in pictures, in documents, on tapes. When you do this we submit you will find that the government and its witnesses have been entirely candid and truthful." (36:5031).

He pursued this road repeatedly, urging the jury to acquit everybody if it found that the case was fabricated, because, he said, "The only place it could have been done, according to the record, was in my office. And ladies and gentlemen, if you believe that that's the way it was, then you should spend no more than one minute in your deliberations and you should acquit all sixteen defendants." (36:5031). This argument too has been condemned. United States v. Brawer, 482 F. 2d 117, 133 (2d Cir. 1973). In fact, the argument plainly placed Mr. Curran's own credibility on the line, in violation of United States v. Grunberger, 431 F. 2d 1062 (2d Cir. 1970); United States v. White, 486 F. 2d 204 (2d Cir. 1973); and United States v. Puco, supra. He did it again when he said:

"...as the United States Attorney for this district I have a great obligation to and esteem for my client. My client is the United States. I want to leave you with the knowledge that that obligation is one to which I am firmly committed. (36:5140)

He argued that defense counsel are bound by their oath to be advocates for their clients, whereas members of the United States Attorney's office "have an obligation to justice." (36:1540) This was reversible error. Hall v. United States, 419 F. 2d 582 (5th Cir. 1969). Cf. United States v. Drummond, 481 F. 2d 62 (2d Cir. 1962).

Mr. Curran also made an extra-record argument that was highly prejudicial to DiNapoli, and totally unjustified. After insinuating that Vincent DiNapoli, the defendant's brother, was a member of the conspiracy (36:5094), Mr. Curran said:

"DiNapoli was sitting as a spectator in the second row right here staring at Stasi while Stasi testified. What does your common sense tell you about that?" (36:5094)

Lest the jury miss the point of suggested intimidation, Mr. Curran returned to the matter: "Vincent DiNapoli came to court. He didn't come to testify up there, no" (36:5129). This kind of argument has no place in a criminal trial. It was clearly a calculated effort to prejudice DiNapoli with matter that was not in evidence and alone should require reversal. United States v. Serrano, 496 F. 2d 81 (5th Cir. 1974); United States v. Whitmore, 480 F. 2d 1154, 1156 (D.C. Cir. 1973); United States v. Wasko, 473 F. 2d 1282 (7th Cir. 1973).

5. Pursuant to Rule 28(1), Federal Rules of Appellate Procedure, Appellant adopts the points and arguments of co-appellants insofar as they are applicable to him.

CONCLUSION

The judgment below should be reversed with directions to dismiss. Alternatively, the case should be remanded for a new trial.

Respectfully submitted,

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